

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

 ORIGINAL

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Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge  
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THE STATE,

RESPONDENT,

V.

ERNEST RAY BAILEY,

APPELLANT

APPELLATE CASE NO 2017-001290  
\_\_\_\_\_

FINAL BRIEF OF APPELLANT  
\_\_\_\_\_

RECEIVED

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SC Court of Appeals

SUSAN B. HACKETT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR APPELLANT

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### **STATEMENT OF ISSUE ON APPEAL**

Did the trial judge err in failing to grant a directed verdict of acquittal on the charge of unlawful conduct toward a child where the state failed to present any direct or substantial circumstantial evidence that Appellant was responsible for the welfare of the minor children or that Appellant placed the minor children at an unreasonable risk of harm affecting the minors' lives or safety?

### **STATEMENT OF THE CASE**

On September 15, 2016, a Colleton County grand jury indicted Appellant for unlawful neglect of a child or helpless person (2016-GS-15-549). R. 145-146. The state, represented by Reed Evans, called the case for trial on May 22, 2017, before the Honorable Perry M. Bucker and a jury. R. 1. David Mathews represented Appellant. R. 1. The jury convicted Appellant as charged. R. 134, ll. 10-14. Judge Buckner sentenced Appellant to seven years imprisonment suspended upon time served and probation for two years. R. 139, l. 13 – R. 140, l. 5; R. 147.

On June 1, 2017, Appellant served his notice of appeal. This brief follows.

## ARGUMENT

The trial judge erred in failing to grant a directed verdict of acquittal on the charge of unlawful conduct toward a child where the state failed to present any direct or substantial circumstantial evidence that Appellant was responsible for the welfare of the minor children or that Appellant placed the minor children at an unreasonable risk of harm affecting the minors' lives or safety.

### **Relevant Facts**

#### *Motion to suppress*

Prior to trial, Appellant moved to suppress certain evidence as irrelevant to the charged offense. R. 2, l. 21 – R. 6, l. 11; R. 141-143. Specifically, Appellant moved to suppress evidence of “the children being locked in their room,” “the refrigerator and freezer being locked and buckets for the children for them to use in the bathroom.” R. 4, ll. 18-24; R. 141-143. Appellant argued that none of those alleged facts were relevant because none satisfied the statute under which Appellant was charged. R. 5, ll. 6-25; R. 141-143. Additionally, Appellant denied any legal duty toward the children. R. 141-143.

The state countered the evidence listed by defense counsel was “essentially the basis of the entire case.” R. 8, ll. 3-4. However, the state conceded Appellant did not have custody of the children, was not a parent, and was not a guardian; thus, the state was proceeding under the theory that Appellant was a person who was responsible for the welfare of the children. R. 8, l. 22 – R. 9, l. 3.

The judge concluded that whether Appellant fit within the definition of a person responsible for a child’s welfare “could be an issue of fact.” R. 12, ll. 17-21. The judge concluded, “It may be a mixed question of law [and] fact, and therefore, the motion [was] not

appropriate as a pre-trial motion.” R. 12, ll. 18-23. The judge stated that because he could not conclude whether Appellant satisfied the statute until he had heard the evidence the judge ruled the motion was premature. R. 12, l. 17 - R. 13, l. 8.

*Prosecution’s case-in-chief*

Minor 1 and Minor 2 were removed from their mother’s custody in 2005. R. 21, l. 25; R. 39, ll. 6-12. They were placed into the care of their maternal grandmother, Loma. R. 21, ll. 22-25; R. 38, ll. 9-14; R. 57, ll. 19-20; R. 141-143. In June 2016, Appellant also lived in the home with the young men and their grandmother. R. 21, ll. 17-21; R. 22, ll. 23-24; R. 38, ll. 9-20; R. 141-143.<sup>1</sup> Appellant explained that he and Loma were not married and that he lived in the home at her pleasure. R. 141-143.

Loma, the young men’s grandmother, was in charge of the young men. R. 22, l. 25 – R. 23, l. 1; R. 40, ll. 2-6. However, Minor 1 and Minor 2 claimed Appellant would “be in charge” whenever Loma was at work or a store. R. 23, ll. 1-31; R. 40, ll. 5-9. According to Minor 1, he and his brother stayed in their rooms when Appellant was in charge. R. 23, ll. 19-23. The bedrooms used by the young men did not have air conditioning. R. 23, l. 24 – R. 24, l. 4; R. 42, ll. 11-12. Those rooms were cooled with the air conditioning unit in the living room and fans. R. 23, ll. 24-25; R. 24, ll. 18-19. The bedrooms were latched, but the young men could easily unlatch the doors to leave their rooms – and frequently did. R. 25, l. 9 – R. 26, l. 12; R. 41, ll. 11-16. The doors to the children’s bedrooms did not have doorknobs; therefore, the latches were used to keep the doors closed. R. 33, l. 21 – R. 34, l. 1; R. 72, ll. 24-25; R. 73, ll. 23-25. Additionally, the young men occasionally used buckets when using the bathroom. R. 26, l. 25 – R. 27, l. 9; R. 43, ll. 1-13. Minor 1 explained that the buckets would be emptied within five

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<sup>1</sup> The DSS worker claimed Appellant was the grandmother’s paramour. R. 57, ll. 17-20. She defined a paramour as “a boyfriend/girlfriend, significant other.” R. 57, ll. 21-22.

minutes of use. R. 27, ll. 18-24. However, Minor 2 claimed the buckets were emptied after five days. R. 44, ll. 2-9.

Minor 2 recalled that when he would get into trouble for doing things, such as cursing at Appellant, he would be punished. R. 40, ll. 10-18. Appellant would punish the young men by latching them in their rooms and taking their toys and things. R. 40, ll. 19-21. Minor 2 admitted that he lied when he claimed Appellant had stabbed him in the abdomen. R. 45, ll. 2-16; R. 52, ll. 13-15. In fact, Minor 1 caused the injury when the two were "playing pirates outside." R. 45, ll. 2-3; R. 52, ll. 20-22. Additionally, Minor 2 revealed he was suspended from school for stealing his teacher's laptop. R. 50, ll. 20-22. At the time of trial, Minor 2 admitted he stole from and lied to his current foster mother. R. 50, l. 23 – R. 51, l. 3.

On June 21, 2016, Tiffany Fagnoli from the Department of Social Services arrived at Loma's home. R. 28, ll. 3-4; R. 55, ll. 1-4. Initially, Appellant refused to permit Fagnoli to enter the residence. R. 28, ll. 3-4; R. 57, ll. 1-5. However, Fagnoli quickly returned with a police officer and entered. R. 29, ll. 8-23; R. 57, ll. 9-10; R. 58, ll. 5-10; State's Exhibit #1. When Fagnoli arrived, the young men showed her around the house. R. 31, ll. 5-8; R. 46, ll. 6-9; State's Exhibit #1.

Fagnoli observed holes in the door frames where there had been latches, according to the young men. R. 31, ll. 5-6; R. 58, ll. 15-22; State's Exhibit #1. Minor 1 and Minor 2 explained the latches were on the outside of the doors, but were easily unlatched from inside. R. 41, ll. 11-13. The young men would frequently unlatch their bedroom doors and take food from the kitchen. R. 31, ll. 15-22; R. 32, ll. 5-12. Additionally, Fagnoli saw locks on the refrigerators, freezers, and cabinets. R. 31, ll. 7-8; R. 59, ll. 5-7. She saw "buckets outside that had fresh water in them." R. 59, ll. 7-8; State's Exhibit #1. Fagnoli claimed she "learned that the children

were urinating and defecating in the buckets because the buckets were placed in their bedrooms.” R. 60, ll. 10-14. She further claimed the young men “couldn’t even get toilet paper to wipe or clean themselves.” R. 60, ll. 21-22. Fagnoli found this “very concerning” due “to the illnesses you can get from that, the uncleanliness, the risk of infection, the risk of getting E. coli and things of that nature.” R. 60, ll. 23-25. According to Fagnoli, the young men “weren’t bathing” and “had not taken a bath for over a month.” R. 61, ll. 2-6.

Fagnoli authorized law enforcement to take Minor 1 and Minor 2 into “protective custody.” R. 32, ll. 13-15; R. 66, l. 22 – R. 67, l. 1. Fagnoli took the children to their pediatrician for a medical evaluation. R. 67, ll. 1-2; R. 76, ll. 7-11. Although the young men were subsequently placed into the custody of a cousin, one of them was “put out” for lying and stealing. R. 33, ll. 12-17.

A local police officer interrogated Appellant. R. 80, ll. 12-13. According to the officer, Appellant stated “he did allow the children to pee and poop in buckets as well as he would feed them when they got home and would only let them out certain amounts of time.” R. 81, ll. 20-22. The officer claimed this “was a concern ... because ... it’s damaging to [the children’s] mental state.” R. 81, ll. 24-25; State’s Exhibit #1. The officer explained that based upon his interrogations of the grandmother and Appellant, Appellant was in charge only when the grandmother was not at home – Appellant was a babysitter. R. 84, ll. 8-12.

Appellant told the officer who arrived at the home that the home belonged to “Ms. Loma,” who was the grandmother of the young men. State’s Exhibit #1. Appellant explained the young men stole all of the milk out of the refrigerator and were always stealing. State’s Exhibit #1. According to Appellant, the refrigerator had a lock on it because nothing would be left without the lock. State’s Exhibit #1. Appellant said he watched the boys while Loma worked

and describe himself as the babysitter. State's Exhibit #1. He told the officer that it was his "job ... to watch them until she gets home from work." State's Exhibit #1.

*Motion for directed verdict*

At the conclusion of the state's case, Appellant moved for a directed verdict, explaining the state failed to present any evidence to show there was "a risk of harm affecting a child's life, physical or mental health or safety." R. 89, ll. 11-14. Further, he argued there was no evidence Appellant did or caused to be done "unlawfully, maliciously, any bodily harm to the child, to the life or the health of the child's endangered -- life would be endangered or willfully abandon the child." R. 89, l. 22 -- R. 90, l. 2.

Judge Buckner denied the motion for directed verdict:

Defendant's charge[d] under 63-5-70, which includes a -- with unlawful conduct towards the child -- it includes the person who is responsible for the welfare of the child. Once again, unobjected to, Mr. Mathews tried to elicit and did elicit from Officer O'Quinn that, because the statute excluded babysitters, Mr. Mathews asked a leading question on cross-examination as to whether not the defendant was a babysitter.

But the evidence suggests at this stage, taken in the light most favorable to -- I have to also consider whether or not the person was, within the statute, a person who was responsible for the welfare of the child as defined in 63-7-20, because that is the language of 63-5-70. 63-5-20 has a lengthy definition of child abuse or neglect or harm, and it includes not only involving parents or guardians but any person that is responsible for a child's welfare. And the definition says inflicts or allows to be inflicted upon the child physical or mental injury or engages in actual omissions, which present a substantial risk of physical or mental injury to the child....

Because of the language in the statute, which says -- which presents a substantial risk of physical or mental injury to the child, your motion for directed verdict at this stage is respectfully denied.

R. 90, l. 16 -- R. 91, l. 22.

### *Defendant's case-in-chief*

Dr. Michael Smith, the physician for the young men, evaluated them when DSS removed them from their grandmother's custody. R. 94, l. 9 - R. 95, l. 1. Dr. Smith concluded both were well-nourished. R. 95, ll. 12-13. Years earlier, Dr. Smith diagnosed Minor 1 and Minor 2 with Attention-Deficit Hyperactivity Disorder (ADHD). R. 96, ll. 8-12. When arriving at the diagnoses, Dr. Smith learned one of boys frequently "lie[d] to obtain goods or favors and to avoid obligations." R. 97, ll. 5-15. The other boy had stolen valuable items. R. 97, ll. 20-24.

### *Renewal of motion for directed verdict*

After the defense's case-in-chief, Appellant reviewed his motion for directed verdict. R. 102, ll. 19-20. Judge Buckner again denied the motion. R. 102, ll. 21-24. Judge Buckner explained he was "going to deal with the question ... raised [in the motion for directed verdict] in the manner in which [he] charge[d] the jury in th[e] case." R. 102, l. 25 - R. 103, l. 3.

### *Closing argument*

During the closing argument, the state explained the jury would have to determine if Appellant was responsible for the children. R. 107, ll. 6-8. According to the solicitor, Appellant was responsible for the children because he (1) lived in the home, (2) was in charge when the grandmother was not at home, and (3) was not paid for his services. R. 107, ll. 15-19. The solicitor argued Appellant was not a babysitter because he "wasn't being compensated." R. 107, ll. 19-23.

The next question for the jury, according to the solicitor, was whether the young men were put at unreasonable risk of harm, "which could have affected their life, physical or mental health, or safety." R. 108, ll. 1-9. The solicitor argued the minors were placed in harm because the bedrooms' windows were nailed shut and the bedrooms did not have air conditioning. R.

108, ll. 10-16. Additionally, the solicitor argued the boys were placed in harm because they were required to use the bathroom in buckets on occasion. R. 108, ll. 21-22. He also argued that it was an unreasonable risk of harm because the boys did not have “anything to wipe with after” using the bathroom and had not taken baths. R. 109, ll. 3-7.

#### *Jury instructions*

The judge instructed the jury that the state was required to prove Appellant “had charge or custody of the child or was the parent or guardian of the child or was responsible for the care and support of the child.” R. 127, ll. 16-21. Further, the judge instructed:

A person responsible for a child’s welfare would include the child’s parent, the child’s guardian, or foster parent, an operator, employee, or caregiver of a public or private residential home or institution or agency, or a child day care facility, or an adult who has assumed the role or responsibility of a parent or guardian for the child but does not necessarily have legal custody of the child. This does not include a person whose only role is a caregiver and whose contact is only incidental with the child, such as a babysitter.

R. 127, l. 22 – R. 128, l. 6.<sup>2</sup> The judge also instructed the jury that the state was required to prove Appellant “placed the child at an unreasonable risk of harm affecting the child’s life or safety. This may be accomplished through an action or the failure to perform some action.” R. 128, ll. 7-11. He concluded: “The law requires only that the child experienced, from the evidence, an unreasonable risk of harm if proven by the State of South Carolina beyond a reasonable doubt.” R. 128, ll. 13-16.

#### *Additional argument*

After the instructions, the judge inquired as to any exceptions or additions. R. 132, l. 25 – R. 133, l. 3. When defense counsel explained he was objecting to “[t]he particular elements of

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<sup>2</sup> The judge later explained that he did not charge the jury regarding the statutory elements of physical and mental harm because the state conceded it had not presented evidence of those. R. 132, ll. 18-25.

physical harm contained within ...,” the judge interrupted to explain the state “told [him] that they did not argue that there was any physical harm in this case,” and as a result, the judge declined to instruct the jury on “physical harm.” R. 132, ll. 18-20. The same was true for mental harm. R. 132, l. 20. According to the judge, he “tailored” the charge to defense counsel’s argument. R. 132, ll. 22-23. Therefore, he refused to charge the definition in the statute of physical and mental harm. R. 132, ll. 23-25.

### **Discussion**

A defendant is entitled to a directed verdict when the prosecution fails to provide evidence of the offense charged. State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916); State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006); State v. McHoney, 344 S.C. 85, 97, 544 S.E.2d 30, 36 (2001). “If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused,” the trial judge may deny the motion for directed verdict. State v. Lollis, 343 S.C. 580, 584, 541 S.E.2d 254, 256 (2001); State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526, 527 (2000); State v. Martin, 340 S.C. 597, 533 S.E.2d 572 (2000). When the prosecution relies exclusively on circumstantial evidence, the trial judge must direct a verdict in the defendant’s favor unless there is substantial circumstantial evidence which reasonably tends to prove the guilt of the defendant or from which his guilt may be fairly and logically deduced. State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011); State v. Mitchell, 341 S.C. 406, 535 S.E.2d 126 (2000). Likewise, a directed verdict is appropriate when the evidence produced “merely raises a suspicion the accused is guilty.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Arnold, 361 S.C. 386, 389-390, 605 S.E.2d 529, 531 (2004); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450, 451-452 (1984); State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999). Our courts define suspicion as “a belief or opinion as to guilt based upon facts or circumstances

which do not amount to proof.” Lollis, 343 S.C. at 584, 541 S.E.2d at 256; State v. Hyder, 242 S.C. 372, 131 S.E.2d 96 (1963).

In Mitchell, 341 S.C. at 409, 535 S.E.2d at 127, the South Carolina Supreme Court held the lower court erred in failing to direct a verdict where the only evidence presented against the defendant was his fingerprint at the scene of the burglary. Likewise, the Lollis Court directed a verdict of acquittal in the defendant’s favor where the state presented no direct evidence that Lollis was involved in setting fire to his home. The only circumstantial evidence against Lollis was that his wife admitted to the arson, he had placed valuables in storage prior to the fire, he possessed a key to the storage unit, and he allegedly had financial troubles. The Court found this evidence insufficient. Lollis, 343 S.C. at 584-585, 541 S.E.2d at 256-257.

In State v. Odems, 395 S.C. 582, 720 S.E.2d 48 (2012), the Court held the defendant was entitled to a directed verdict based upon a lack of substantial circumstantial evidence that the defendant was involved in the burglary. Although Odems was in a car with other individuals who admittedly burglarized a home, the state failed to provide substantial circumstantial evidence that Odems was present during the home invasion. The witness who saw individuals at the home claimed she saw two, not three as were found in the car. Fingerprints collected from the stolen goods did not match Odems, but matched the other individuals in the car. One of the individuals who admitted his involvement claimed Odems was picked up after the burglary at a gas station. Id. at 588, 720 S.E.2d at 51. As explained by the Court, although our courts have abandoned the traditional circumstantial evidence jury charge, the language of the charge is instructive in making a directed verdict determination. The traditional charge provided:

Every circumstance relied upon by the State be proven beyond a reasonable doubt; and ... all of the circumstances proven be consistent with each other and taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis.

Id. at 590, 720 S.E.2d at 52 (quoting State v. Hernandez, 382 S.C. 620, 626 n.2, 677 S.E.2d 603, 606 n.2 (2009)).

In State v. Bostick, 392 S.C. 134, 141, 708 S.E.2d 774, 778 (2011), the Supreme Court held the prosecution failed to present substantial circumstantial evidence of Bostick's guilt. Rather, the state's evidence was capable of producing only a suspicion of Bostick's guilt. Id. Although the police found items belonging to the victim in a burn pile behind the home of Bostick's mother, the Court held no evidence linked Bostick to the evidence in the burn pile and the prosecution presented no testimony that Bostick had control over the burn pile. Id. at 137-141, 708 S.E.2d at 775-778. The only other evidence presented against Bostick was that he had a chemical pattern that matched gasoline on his shoes and gasoline was used to start the fire at the victim's home, and DNA from blood on Bostick's jeans excluded ninety-nine percent of the population, but the expert could not testify the DNA matched the victim. Id. at 142, 708 S.E.2d at 778.

Pursuant to the statute for which Appellant was charged with violating, "[i]t is unlawful for a person who has charge or custody of a child, or who is the parent or guardian of a child, or who is responsible for the welfare of a child as defined in Section 63-7-20 to: (1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety." S.C. Code Ann. § 63-5-70(A)(1).

The statute at issue is penal in nature; therefore, it must be constructed strictly against the state. Berry v. State, 381 S.C. 630, 675 S.E.2d 425 (2009); State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). "[A]ny doubt must be resolved in favor of the defendant." State v. Germany, 216 S.C. 182, 188, 57 S.E.2d 165, 168 (1949). "The cardinal rule of statutory construction is to ascertain and effectual legislative intent." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); Branch v. City of Myrtle Beach, 340 S.C. 405, 409, 532 S.E.2d 289, 292

(2000). “A law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly.” Hinton v. South Carolina Dept. of Probation, Parole and Pardon Services, 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Hodges, 341 S.C. at 85, 533 S.E.2d at 581. Put another way, “[i]f a statute’s language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning.” Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 24, 579 S.E.2d 334, 337 (Ct. App. 2003). “When the terms of the statute are clear and unambiguous, the court must apply them according to their literal meaning.” Blackmon, 304 S.C. at 273, 403 S.E.2d at 662. “[I]n construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation.” Id.; Hinton, 357 S.C. at 333, 592 S.E.2d at 339 (explaining that “[w]hen faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning”).

*Responsible for the welfare*

The state contended Appellant was “responsible for the welfare” of the children. R. 8, l. 22 – R. 9, l. 3.<sup>3</sup> According to the statute, a person responsible for a child’s welfare is “the child’s parent, guardian, foster parent, an operator, employee, or caregiver, as defined by Section 63-13-20, of a public or private residential home, institution, agency, or childcare facility or an adult who has assumed the role of responsibility of a parent or guardian for the child, but who does not

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<sup>3</sup> At the trial, the state conceded Appellant did not have charge or custody of the children. R. 8, l. 22 – R. 9, l. 3. Further, the state conceded Appellant was not the parent of the children. R. 8, l. 22 – R. 9, l. 3.

necessarily have legal custody of a child.” S.C. Code Ann. § 63-7-20(18).<sup>4</sup> The statute excludes caregivers “whose contact is only incidental with a child, such as a babysitter or a person who has only incidental contact but may not be a caretaker, has not assumed the role or responsibility of a parent or guardian.” Id.

Recently, this Court addressed the specific portion of the statute at issue in this case – person responsible for the welfare of the child. State v. Williams, 405 S.C. 263, 279-280, 747 S.E.2d 194, 203 (Ct. App. 2013). This Court held the state presented some evidence Williams had “assumed the role of a parent,” as that phrase was used in the statute, where (1) Williams and the child’s mother had been dating for four months, (2) Williams had stayed overnight with them between two and four nights a week, (3) Williams and the mother had discussed moving in together, (4) the mother would ask Williams to tell the child to stop if he were doing something wrong, (5) Williams had authority to verbally instruct the child, but could not physically discipline the child, (6) Williams had changed the child’s diaper, (7) Williams would watch the child while the mother was cooking, (8) Williams had bathed the child, and (9) Williams had watched the child with other adults present. Id.

In another recent case, this Court held a person was “responsible for a child’s welfare” where the person “assisted in [the child]’s care during the two months she lived with [the person] before she died.” State v. Huckabee, 419 S.C. 414, 433, 798 S.E.2d 584, 594 (Ct. App. 2017).

The question in the instant case was whether Appellant was a babysitter for the two young men. The South Carolina Code provides no definition of babysit or babysitter. Therefore, it is necessary to turn to the ordinary and plain meaning of the term. To “babysit” means “to care

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<sup>4</sup> This statute was amended by the South Carolina General Assembly on June 5, 2016. The indictment alleged the conduct for which Appellant was convicted occurred on June 21, 2016. R. 145-146.

for children usually during a short absence of the parents.” Merriam-Webster Online Dictionary.

2018. <https://www.merriam-webster.com/dictionary/babysit> (last visited on Feb. 19, 2018).<sup>5</sup>

Despite the solicitor’s insistence that a babysitter included only those paid for babysitting services, the plain and ordinary meaning of the term embraces those who care for children other than their own regardless of payment. According to the testimony, Appellant cared for the young men while their parent, Loma, was absent. Furthermore, Appellant’s care of the children was limited to when Loma was absent for short periods of time – working or going to the store. Thus, under the plain and ordinary meaning of the statutory term “babysitter,” Appellant was a babysitter and not “responsible for the welfare” of the two children.”

In light of the statutory provision’s contrast between a babysitter and a caregiver in a childcare facility, the statutory scheme regarding childcare facilities provides additional guidance. A “[c]aregiver” means any person whose duties include direct care, supervision, and guidance of children in a childcare facility.” S.C. Code Ann. § 63-13-20(1). A childcare facility is “a facility which provides care, supervision, or guidance for a minor child who is not related by blood, marriage, or adoption to the owner or operator of the facility.” S.C. Code Ann. § 63-13-20(4). Finally, childcare “means the care, supervision or guidance of a child or children, unaccompanied by the parent, guardian, or custodian, on a regular basis, for periods of less than twenty-four hours per day, but more than four hours, in a place other than the child’s or the children’s own home or homes.” S.C. Code Ann. § 63-13-20(2). One of the key distinguishing characteristics of a caregiver in a childcare facility is that the children for whom the caregiver

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<sup>5</sup> See also Tropical Coach Lines, Inc. v. King, 147 So.2d 318, 319 (Fla. 1962)(explaining babysitter “may be defined as relating to one who takes care of a child during the temporary absence of its parents”).

cares are not in their own homes. Babysitters typically provide care for the children in the homes of the children.

The statutory scheme also involves strict requirements for childcare facilities, including education and experience for caregivers, S.C. Code Ann. § 63-13-30, background checks for caregivers, S.C. Code Ann. § 63-13-40, registration of the children, S.C. Code Ann. § 63-13-70, presence of a caregiver with a current certificate for basic first aid and child-infant cardiopulmonary resuscitation, S.C. Code Ann. § 63-13-110. As the statutory scheme makes clear, Appellant was not a caregiver in a childcare facility. This contrast shows Appellant was a mere babysitter.

Appellant and the young men made clear that Appellant cared for them only when Loma was not present. Appellant was not sharing in a parental role with Loma as the defendants in Williams, supra, and Huckabee, supra. In light of Appellant's care for the young men occurring only when Loma, their legal guardian, was not present, Appellant's role as a babysitter is even more apparent. Appellant was not responsible for the welfare of the two young men as he was a mere babysitter.

*Unreasonable risk of harm affecting life or safety*

Complicating consideration of this matter is the judge's finding at the mid-trial directed verdict stage that he was denying the motion "[b]ecause of the language in the statute, which says - - which presents substantial risk of physical or mental injury to the child," and the solicitor's concession during the jury charge conference that no evidence had been presented that the children were placed at an unreasonable risk of harm affecting the physical health or mental health of the children. See R. 91, ll. 19-22; R. 132, ll. 18-25. In short, it appears the judge based his denial of the directed verdict motion on the existence of evidence the state conceded did not

exist. In light of the state's concession at trial and the trial judge's agreement with the concession as evidenced by his jury charge omitting any language regarding physical or mental injury, Appellant will analyze whether the state presented direct or substantial circumstantial evidence that Appellant placed the two young men at unreasonable risk of harm affecting their lives or safety.

This Court held evidence of a defendant's complicity in the beatings of a child during the last two months of his life and the defendant's failure to seek medical treatment during the last two weeks of the child's life placed the child at an unreasonable risk of harm affecting the child's physical health, mental health, and life. State v. Thompson, 420 S.C. 192, 212, 802 S.E.2d 623, 633 (Ct. App. 2017). In State v. Palmer, 413 S.C. 410, 421, 776 S.E.2d 558, 564 (2015), the Supreme Court held there was evidence that a grandmother placed her grandson "at an unreasonable risk of harm" where the grandmother "told at least two people that she was continuing to give the victim Xyzal, which has a sedative effect, after it was no longer medically indicated, and in amounts three to five times the recommended dosage," admitted "lacking patience, smacking the victim on his hands and his diapered behind, and shaking him."

Although this Court was not addressing the unlawful conduct statute, this Court's decision in South Carolina Dept. of Social Services v. Minor, 396 S.C. 390, 720 S.E.2d 920 (Ct. App. 2011) provides some assistance in determining the meaning of "unreasonable risk of harm to the child's life or safety" because this Court interpreted a similar phrase in the statutory scheme governing termination of parental rights. In that case, this Court held returning the children to their mother's home was statutorily required because their return would not cause unreasonable risk of harm to their lives, physical health, safety, or mental well-being. Id. at 402, 720 S.E.2d at 926. This Court explained it could not "characterize Mother's limited financial

ability ... as causing an ‘unreasonable risk of harm’ ... of such magnitude that [termination of parental rights] is required.” Id.

In the case at bar, there were no beatings, no administration of medicines, and no smacking as in Thompson, supra, and Palmer, supra.<sup>6</sup> As this Court explained when discussing termination of parental rights, limited financial ability cannot amount to “unreasonable risk of harm” of such magnitude to require terminating a parent’s rights; therefore, it follows that limited financial ability cannot amount to unreasonable risk of harm of such magnitude as to convict a person of a crime. The lack of air conditioning and the necessity of limiting food intake was due to the family’s limited financial ability and cannot amount to an unreasonable risk of harm, particularly where the doctor testified the children were well-nourished, there was ample food in the house, and the young men admitted to being fed by Appellant and Loma and taking food directly from the kitchen.

The state failed to present any direct or substantial circumstantial evidence tending to show Appellant was a person responsible for the welfare of the young men or that he created an unreasonable risk of harm to the lives and safety of the young men. Therefore, he was entitled to a directed verdict on the charge of unlawful conduct toward a child. The trial judge erred in failing to grant his motion. Appellant respectfully requests this Court correct the judge’s erroneous legal conclusion.

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<sup>6</sup> See also, State v. Jarrell, 350 S.C. 90, 95, 564 S.E.2d 362, 365 (Ct. App. 2002)(noting the defendant was charged with three counts of unlawful conduct toward a child, which were not the subject of the appeal, where during the investigation of a child’s death, the police observed the family’s home “was filthy with animal feces, fly strips, baby bottles with clabbered milk, unwashed dishes, dirty diapers, and it smelled of urine”); State v. Batchelor, 377 S.C. 341, 342-343, 661 S.E.2d 58, 58-59 (2008)(explaining the defendant was convicted of three counts of unlawful conduct toward a child where the defendant was driving while under the influence, insisted his fifteen-year old son, whom he had plied with alcohol, drive the truck in which he and his other two children were).

**CONCLUSION**

Appellant respectfully requests this Court direct a verdict of acquittal on the charge of unlawful conduct toward a child.

Susan B. Hackett

Susan B. Hackett  
Appellate Defender

ATTORNEY FOR APPELLANT

This 23th day of May, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 23, 2018

*Susan B. Hackett*

Susan B. Hackett  
Appellate Defender

S.C. Commission on Indigent Defense  
Division of Appellate Defense  
1330 Lady Street, Suite 401  
Post Office Box 11589  
Columbia, South Carolina 29211-1589

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